

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-

MAINE ASSOCIATION OF HEALTH
PLANS, a corporation organized and existing
under the laws of the State of Maine,

ANTHEM HEALTH PLANS OF MAINE,
INC. d/b/a ANTHEM BLUE CROSS AND
BLUE SHIELD, a corporation organized and
existing under the laws of the State of Maine,

MAINE STATE CHAMBER OF
COMMERCE, a non-profit corporation
organized and existing under the laws of the
State of Maine,

and

MAINE AUTOMOBILE DEALERS
ASSOCIATION INSURANCE TRUST, a
multiple employer welfare arrangement
organized and existing under the laws of the
State of Maine,

Petitioners

v.

DIRIGO HEALTH AGENCY BOARD OF
DIRECTORS,

Respondent.

PETITION FOR REVIEW OF REFUSAL
OF AGENCY TO ACT AND REQUEST
FOR EXPEDITED REVIEW

M.R.Civ.P 80C &
5 M.R.S.A. § 11002

NOW COME Petitioners Maine Association of Health Plans ("MEAHP"), Anthem
Health Plans of Maine, Inc. d/b/a Anthem Blue Cross and Blue Shield ("Anthem BCBS"), Maine
State Chamber of Commerce (the "Chamber") and Maine Automobile Dealers Association
Insurance Trust ("Trust") (collectively "Petitioners"), by and through their undersigned

attorneys, and pursuant to 5 M.R.S.A. §§ 11001, *et seq.*, and M.R. Civ. P. 80C, petition this Court for expedited review of the Dirigo Health Agency Board of Directors' ("DHA Board" or "Board") refusal to hold a hearing and issue a decision as required by 24-A M.R.S.A. § 6913. As will be discussed more thoroughly below, the process authorized by the Board in the proceeding from which Petitioners appeal is replete with fundamental flaws that are contrary to a fair proceeding, culminating in the Board's granting of a motion by its agency to ignore a clear and unambiguous statutory requirement that the Board hold an adjudicatory hearing and issue a decision in the underlying matter "not later than April 1st." Petitioners seek an order from this Court requiring the Board to adhere to this clear and unambiguous requirement.

I. PARTIES AND NATURE OF THE CASE

1. Petitioner MEAHP is an incorporated association of health plans. Its purpose is to advocate for its member health plans before the Maine Legislature and regulatory agencies and its members include health insurers, health maintenance organizations and third-party administrators.

2. Petitioner Anthem BCBS is a corporation in good standing with a principal place of business in the city of South Portland, county of Cumberland and State of Maine. Anthem BCBS is the State of Maine's largest health insurance carrier as well as the current administrator of the DirigoChoice program.

3. Petitioner the Chamber is a non-profit corporation in good standing with a principal place of business in the city of Augusta, county of Kennebec and State of Maine. The Chamber is a statewide business association that represents large and small Maine businesses. Its members include businesses that provide group health coverage for their employees through self-funded plans and businesses that provide employee health coverage through insured plans.

4. Petitioner Trust is a multiple employer welfare arrangement that secures health insurance for approximately 3,200 employee participants, and approximately 5,800 insurable lives.

5. Respondent DHA Board is the Board of Directors of Dirigo Health. The Board was established by the Dirigo Health Act (the "Act"). See 24-A M.R.S.A. §§ 6903 & 6904.

6. Petitioners are intervenors in a proceeding before the Board (the "Underlying Proceeding"), which was initiated for the purpose of determining the aggregate measurable cost savings as a result of the operation of Dirigo Health.

7. The part of the Act that is relevant to the current Petition provides as follows:

After an opportunity for a hearing conducted pursuant to Title 5, chapter 375, subchapter 4, the board shall determine annually **not later than April 1st** the aggregate measurable cost savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in this State as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004 [(collectively the "Aggregate Measurable Cost Savings" or "AMCS")].

24-A M.R.S.A. § 6913(1)(A) (emphasis added).

8. By a vote of the Board taken on March 27, 2006, in derogation of this statutory requirement, the Board granted a motion by its Agency, the Dirigo Health Agency, to continue the Underlying Proceeding and hold a hearing "not later than August 15, 2006." Attached hereto as Exhibit A is a complete and accurate copy of the Recommended Decision adopted by the Board on March 27, 2006. It is unclear from the Board's Order how long after August 15, 2006 the Board would propose to issue the April 1st decision required by Section 6913(1)(A).

9. Petitioners have filed this Petition requesting an order from this Court requiring the Board to hold the hearing immediately and issue a decision both because the statutory requirement is clear and because Petitioners will suffer significant prejudice if the Board's Order, and the schedule contemplated thereby, is maintained.

II. FACTUAL ALLEGATIONS.

A. How The Act Is Supposed To Work: The Relevant Statutory Background For Calculation Of The Savings Offset Payment And The Timing Of The Relevant Determinations Required By The Dirigo Health Act.

10. The Act was enacted in 2003. According to its provisions, the DHA was established to provide programs of services that include comprehensive health benefits coverage, subsidies for lower-income enrollees, wellness programs and quality improvement initiatives.

See 24-A M.R.S.A. §§ 6903(4-A) & 6912.

11. The funding mechanism for the subsidies for lower-income enrollees, and to support the Maine Quality Forum, is the so-called “savings offset payment” (“SOP”). *See Id.*, §§6913(2)(D) & 6912.

12. The SOP has three distinct caps embodied in the Act. Specifically, the SOP may not exceed: (1) the AMCS, (*see id.*, §6913(2)(C)); (2) “the amount of funds necessary to provide subsidies pursuant to section 6912 and to support the Maine Quality Forum established in section 6951”, (*id.*, §6913(2)(D)); and (3) 4% of annual paid claims, (*id.*, §6913(3)(B)). The present Petition concerns only the first cap; that the SOP may not exceed the AMCS.

13. The process necessary to reach the calculation of the SOP is lengthy:

- In order to determine the SOP, the Board must hold an adjudicatory hearing and issue a determination of the AMCS “not later than April 1st.” 24-A M.R.S.A. § 6913(1)(A).
- The Board’s determination of AMCS, together with supporting documentation, must be filed with the Superintendent of Insurance within thirty (30) days (*i.e.*, no later than May 1). *Id.*, §6913(1)(B).
- The Superintendent thereafter must hold an adjudicatory hearing and issue an order “approving, in whole or in part, or disapproving” the Board’s determination of AMCS. *Id.*, §6913(1)(C). The Act provides that the Superintendent must hold that hearing and issue his decision within six weeks of the Board’s filing of its AMCS determination (*i.e.*, no later than June 12).

- Finally, the Board must then determine the SOP to be assessed on each health insurance carrier, 3rd-party administrator and employee benefit excess insurance carrier. *Id.*, §§ 6913(2)&(3).

14. The final Board-approved SOP is thereafter used for several purposes, including the following:

- Developing premium rates for individuals effective January 1st, the rates for which may be modified only after review and approval by the Superintendent of Insurance. *See Id.*, §6913(2) ("The savings offset amount determined by the board in accordance with this subsection is the determining factor for inclusion of savings offset payments through rate setting review by the bureau."). Carriers target filing individual rates with the Superintendent in July, with a hearing in September and ultimate decision by the Superintendent in October.
- Developing premium rates for large group insureds to include in quotes for large group renewals (many of which are effective January 1st). The rating process for January-renewed policies begins in July/August.
- Developing premium rates for small group insureds effective January 1st, which rates are filed for use with the Bureau. Small group policies are rated and filed in October. Notice to employers must be provided no later than sixty (60) days in advance of any rate modification (*i.e.*, not later than November 1st).
- Developing health insurance budgets for employers and individuals throughout the State.

15. The contemplation in the Act that the final Board-approved SOP would be determined in late June is consistent with the time necessary to complete the tasks identified in the preceding paragraph sufficiently in advance of the implementation of rates effective January 1st of the subsequent year.

B. The Underlying Proceeding Before The DHA Board: As The Basis For Denying Petitioners' Requests For Modifications To The Procedural Schedule, The Board Reaffirms The Requirement For A Decision Not Later than April 1st.

16. By notice dated January 27, 2006, the Board initiated the Underlying Proceeding for the purpose of determining the AMCS. Attached hereto as Exhibit B is a true and accurate copy of the Board's January 27, 2006 Notice of Pending Proceeding and Hearing.

17. In that notice, the Board established the deadline for intervention, acknowledged that the hearing would be conducted in accordance with the Maine Administrative Procedures Act. The Board also ordered that the hearing would commence on March 15, 2006, acknowledging that “[t]he Board must make its determination [of AMCS] no later than April 1, 2006.” *See Exhibit B.*

18. With that notice, the Board provided to interested parties a draft procedural order, which among other things, established deadlines for exchange of witness lists, documents, witness summaries, expert designations, identification of alternative methodologies for calculating the AMCS, and submission of prefiled testimony and exhibits. All of these deadlines were targeted with the goal of commencing the hearing on March 15. The draft procedural order provided no time or mechanism for obtaining discovery of any kind. Attached hereto as Exhibit C is a true and accurate copy of the draft procedural order.

19. Petitioners objected to the draft procedural order, among other things, because it required simultaneous case submissions, despite that DHA was the party moving for approval of its AMCS methodology and calculation. Petitioners also objected to the absence in the procedural order for an opportunity for discovery and presented an alternative procedural schedule that provided a short period for discovery and the hearings to commence on March 22, still leaving sufficient time for the Board to render its decision before the April 1st deadline.

20. By order issued February 17, 2006, the Board rejected Petitioners arguments, ruling in relevant part as follows:

The Legislature has directed the Board to determine “annually not later than April 1st the aggregate measurable savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in this State as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004.” 24-A M. R. S. A. §6913 (1)(A) . . .

The applica[nts] object that the Draft Oder [sic] does not provide for discovery. This is an administrative proceeding governed by the Maine Administrative Procedures Act. ("APA") The Act does not require that there be an opportunity for discovery. To the extent the Dirigo Health Agency has information that is not publicly available from other sources that applica[nts] believe is necessary to prepare their case, applica[nts] can request the information under the Maine Freedom of Access Act. Related to this objection is the objection of application to the schedule for [sic] established for the proceeding. The schedule is driven by the short time frame the Legislature has established for the Board to make a determination of aggregate measurable cost savings; informed by the fact that the proceeding comes on the heels of an adjudicatory hearing before the Superintendent of Insurance in October 2005; and the familiarity of all interested persons with the issues presented.

With regard to the charge of the applica[nts] that parties have not be[en] given enough time to prepare a case, the Board notes that the Dirigo Act as originally enacted in 2003 included the requirement that the Board, after an adjudicatory hearing, make a determination of aggregate measurable cost savings not later than April. This provision was carried over into Chapter 400. Applica[nts] were members of, or attended the meetings of, the Working Group and were parties to proceedings before the Superintendent in October 2005. Applica[nts], therefore, have had more than sufficient notice that the Board would be holding an adjudicatory hearing prior to April of 2006.

(Order on Intervention and Objections, issued February 17, 2006, attached hereto as Exhibit D.)

21. The Board thereafter issued a Third Procedural Order, calling for commencement of the hearings on March 27, 2006. Attached hereto as Exhibit E is a true and accurate copy of Procedural Order No. 3, issued by the Board on February 22, 2006.

C. DHA Has Repeatedly Failed To Adhere To The Board's Procedural Requirements And Has Refused To Produce Relevant Documents, Without Consequence From, Or Action By, The Board.

22. As directed in the Board's ruling regarding discovery, Petitioners MEAHP and Anthem BCBS promptly (on February 24 & 28, respectively) served FOAA requests in an effort to obtain from the DHA and DHA Board the information relevant to the methodologies proposed for calculation of the AMCS. As will be explained in more detail below, DHA has failed to produce a single document in response to these requests from any of the consultants DHA is relying upon for development of the methodologies for calculation of AMCS.

23. Pursuant to Procedural Order No. 3, all parties were required to designate witnesses, provide witness summaries, designate experts and exchange documents by 5:00 p.m. on March 10, 2006. The order also required the parties to identify any alternative methodology for calculation of AMCS and provide supporting data by 5:00 p.m. on March 13, 2006.

24. On March 7, 2006, DHA moved to continue the hearing, suggesting that it was unable to go forward because, according to DHA, not all of the data DHA deemed important to its calculation of AMCS would be available until July 1, 2006 and that the hearing in the Underlying Proceeding should be delayed until August. Attached hereto as Exhibit F is a true and accurate copy of DHA's Motion to Continue.

25. DHA requested in its motion that its Board suspend the procedural deadlines pending consideration of the motion, but the Board did not act on that request. Instead, those deadlines remained in place and the Hearing Officer¹ issued a directive that the parties submit memoranda of law in support of their positions on DHA's Motion by 5:00 p.m. on March 13, and that oral argument would be heard on March 14.

26. Despite the fact that DHA had yet to produce any documentation for meaningful analysis, Petitioners complied with the Board's deadlines, filing on March 10 their witness designations, witness summaries, document designations and designations of experts. Petitioners who proposed an alternative methodology also identified the proposed alternative by the March 13 deadline required by the Board.

27. Notwithstanding the still-in-force procedural deadlines imposed by its Board on all of the parties, DHA failed to comply with any of the deadlines: they filed no witness

¹ The Board retained James Smith, Esq. to act as the Hearing Officer in the Underlying Proceeding.

designations, no expert designations, no witness summaries, and did not designate, much less produce, any documents.

28. On Monday, March 13, pursuant to the request of the Hearing Officer, Petitioners and DHA submitted memoranda of law in support of their respective positions on DHA's Motion to Continue. In those filings and during the oral argument on the DHA Motion on March 14, Petitioners pointed out, *inter alia*, that (1) the statute clearly and unambiguously requires a determination by the Board of AMCS not later than April 1, 2006; (2) Petitioners, particularly Anthem BCBS and MEAHP, would suffer significant prejudice if the DHA Motion were granted; (3) the Medicare cost report information that DHA asserted as the sole reason to delay was irrelevant to the AMCS, but even if relevant; (4) the Medicare cost report information for the vast majority of Maine hospitals is currently available, which meant that DHA could go forward and put on its case and enable the Board to comply with its statutory deadline to issue a decision that would (a) establish the methodologies for calculation of AMCS for the second year SOP assessment, and (b) include the data currently available with an appropriate mechanism to include the remaining data in the follow-up adjudicatory proceeding before the Superintendent of Insurance.

29. Petitioners also pointed out at the hearing that DHA had yet to produce any documents in response to the Petitioners' requests. After discussion, the Hearing Officer ordered the DHA to (1) produce documents in response to Petitioners' requests by March 17, (2) designate witnesses and provide witness summaries by March 17, and (3) identify its methodology for calculating AMCS by March 20.

30. On March 17, counsel for DHA informed Petitioners that DHA would produce only those responsive documents at DHA's offices, and would not produce any documents in the

possession of DHA's consultants, notwithstanding that the DHA consultants were primarily responsible for developing DHA's proposed methodology and have possession of all of the data and meaningful analyses that are responsive to the requests.

31. When pressed on the legitimacy of this point, counsel for DHA agreed to contact DHA's consultants and request the responsive documents. When a response was not forthcoming, on March 20, Petitioner Anthem BCBS filed a Motion for Clarification of the Hearing Officer's March 14 order. In that motion, Anthem BCBS outlined DHA's position and requested that the Board or Hearing Officer clarify that DHA must produce its consultants' responsive documents.

32. Instead of objecting to the Motion for Clarification, counsel for DHA thereafter indicated that DHA's primary consultant, Mercer Government Human Services Consulting ("Mercer"), had its own counsel and counsel would produce Mercer's responsive documents upon receipt of an administrative subpoena. Counsel for Anthem BCBS drafted and issued the administrative subpoena that same day, requesting that DHA obtain the signature of a Deputy Attorney General (as required by the applicable statute) and issue the subpoena.

33. Counsel for DHA promptly complied and issued the administrative subpoena, which required production of the responsive documents by 12:00 noon on Friday, March 24, 2006, one business day in advance of the hearing that was then scheduled to begin on March 28. Instead of producing documents, Mercer's counsel sent an email on the evening of March 24 to the effect that Mercer would not be producing documents that day and that they would need a minimum of two weeks to produce responsive documents. By that point, it had been four weeks since the document requests had been served, and only one business day remained before the start of the hearing.

34. As of the date of this Petition, DHA has not produced a single one of its consultants' documents and neither the Board nor Hearing Officer has ruled on the Motion for Clarification or otherwise interceded to require DHA to produce the requested documents.

C. The Recommended Decision Granting the Motion to Continue, Petitioners' Clarification Of The Significant Prejudice From Granting The Motion, And The Board's Adoption Of The Recommended Decision Without Modification.

35. On March 20, 2006, the Hearing Officer circulated to the parties a Recommended Decision. In that decision, the Hearing Officer acknowledged the plain words of the Act, but found them to be directory, rather than mandatory. The Recommended Decision also acknowledged the timing issues that are at the core of the prejudice Petitioners would suffer if the motion were granted, but determined that "[t]his argument, however, would not appear to require the denial of the instant motion especially if the hearing was continued until early July 2006 rather than after August 1, 2006." Notwithstanding this conclusion, the recommendation was that the Board grant the motion and hold the adjudicatory hearing "not later than August 15, 2006." *See* Exhibit A, p. 5.

36. While recommending that the adjudicatory hearing commence not later than August 15, the Recommended Decision set no deadline by which the adjudicatory hearing would end and no deadline by which the Board would make its initial determination of AMCS. The Hearing Officer requested comments on, or objections to, the Recommended Decision by 4:00 p.m. on March 24 and indicated that the Board would hold a hearing at 9:00 a.m. on Monday, March 27 to consider the DHA Motion and Recommended Decision.

37. In addition to other arguments, Petitioners in their objections to the Recommended Decision clarified the significant prejudice they would suffer if the DHA Motion were granted. *See, e.g.,* Anthem BCBS's Response to Recommended Decision dated March 24, 2006, pp. 2-5. In that response, Petitioner Anthem BCBS explained that: (1) the Act is designed

to result in a final determination of the SOP by the Board in late June; and (2) a final Board-approved SOP in late June permits inclusion of the SOP in premium rates effective January 1.

38. Anthem BCBS also explained the serious implications if the DHA's Motion were granted. Specifically, the DHA's Motion, if granted, would result in: (1) delaying the first AMCS hearing until mid-August; (2) delaying the Board's AMCS decision until late August; (3) delaying the Superintendent's decision on AMCS until mid-November; and (4) delaying the Board's final determination of the SOP until late November.

39. A delay in the Board's final determination of the SOP until late November, 2006 would make it impossible for Anthem BCBS, and the other carriers who are members of Petitioner MEAHP, to incorporate the final SOP into rates effective January 1, 2007 as contemplated by the Act and the applicable Maine statutes governing insurance rate modifications. Specifically, under the DHA schedule, Anthem BCBS and members of MEAHP would be prevented from: (1) incorporating the SOP into the individual rate setting process before the Bureau of Insurance; (2) incorporating the SOP into the rate setting process for small and large group customers; or (3) providing the notice to policyholders required before rates may be modified. *See* Anthem BCBS's Response to Recommended Decision, pp. 2-5.

40. In addition to prejudice to Anthem BCBS and members of MEAHP, the inability to include the final SOP in the ratemaking process would cause consumer confusion and impair employers and other policyholders from performing the budgeting functions that are critical to the financial planning for many Maine employers and families with private insurance coverage or under self-insured plans.

41. The Act contemplates a thoughtful, deliberative process that ultimately concludes in the Board's final determination of the SOP in late June. All Petitioners would suffer the

additional prejudice of eviscerating that deliberative process and impairing their ability to participate meaningfully in this important process.

42. In light of the very significant prejudice from the proposed delay, and the facts that DHA was prepared to present its methodologies and the vast majority of the data necessary for the AMCS calculation was already available, Anthem BCBS argued that the Board should go forward with the hearing, require DHA to present its methodologies and available data, issue its ruling by the statutory deadline, and present the additional data in the adjudicatory process for determining AMCS before the Superintendent. Put differently, the Act already provides for a follow-up adjudicatory proceeding before the Superintendent, which would provide a mechanism to ensure that all relevant data is considered.

43. On March 27, 2006, with three voting members of the Board present, the Hearing Officer opened the hearing, and indicated that the DHA Motion was ready for Board action. With brief comments, no discussion of the statutory deadline, and no deliberation in public, the Board voted 3-0 to adopt the Recommended Decision, without modification.

COUNT I

44. Pursuant to the Maine Administrative Procedures Act, “[a]ny person aggrieved by the failure or refusal of an agency to act shall be entitled to judicial review thereof in the Superior Court. The relief available in the Superior Court shall include an order requiring the agency to make a decision within a time certain.” 5 M.R.S.A. § 11001(2).

45. The applicable statute, 24-A M.R.S.A. §6913(1)(A), requires the Board to hold an adjudicatory hearing and issue its determination of AMCS “not later than April 1st.”

46. By granting the DHA’s Motion to Continue, the Board has refused to conduct the adjudicatory hearing before April 1st, in violation of Section 6319(1)(A).

47. By granting the DHA's Motion to Continue, the Board has refused to issue its determination of AMCS on or before April 1st, in violation of Section 6319(1)(A).

48. Petitioners have suffered, and will continue to suffer, substantial prejudice from the Board's decision granting the DHA's Motion to Continue and refusal to hold the adjudicatory hearing and issue its determination of AMCS as required by Section 6319(1)(A) and, accordingly, are aggrieved by the Board's failure or refusal to act in accordance with Section 6319(1)(A).

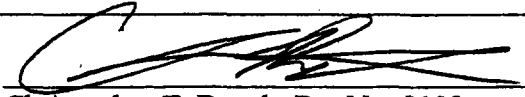
WHEREFORE, Petitioners pray:

A. That the Court grant expedited review of this Petition and find that (1) the Board has failed or refused to act as required by 24-A M.R.S.A. § 6913, and (2) Petitioners are aggrieved by the Board's failure or refusal to act and will be prejudiced by any further delay.

B. That the Court issue an order prohibiting the Board from issuing a determination of AMCS for the second assessment year or, in the alternative, requiring: (1) the production of all documents in the possession of DHA's consultants that are responsive to Petitioners' FOAA requests no later than three (3) days after the issuance of the Court's order; (2) the Board to hold the adjudicatory hearing required by Section 6319(1)(A) no sooner than ten (10) days, but no later than fourteen (14) days, after Petitioners receipt of the aforementioned documents; (3) the Board to issue its determination of the proposed methodologies and calculation of AMCS for the second assessment year no later than seven (7) days after the conclusion of the adjudicatory hearing; and (4) the Board to file its determination of AMCS and supporting information with the Superintendent of Insurance no later than fourteen (14) days after the conclusion of the adjudicatory hearing, or May 1, 2006, whichever is later.

C. That the Court grant Petitioners their costs and enter such other orders and decrees as the case may require.

DATED: March 30, 2006

<p><u>/s/ D. Michael Frink</u> D. Michael Frink, Bar No. 2637</p> <p>CURTIS THAXTER STEVENS BRODER & MICOLEAU LLC One Canal Plaza P.O. Box 7320 Portland, ME 04112-7320 207-774-9000</p> <p><i>Attorney for Maine Association of Health Plans</i></p>	<p> Christopher T. Roach, Bar No. 8122</p> <p>PIERCE ATWOOD LLP One Monument Square Portland, ME 04101 207-791-1100</p> <p><i>Attorney for Anthem Health Plans of Maine, Inc. d/b/a Anthem Blue Cross and Blue Shield</i></p>
<p><u>/s/ William H. Stiles</u> William H. Stiles, Bar No. 8123</p> <p>VERRILL DANA LLP One Portland Square P.O. Box 586 Portland, ME 04112-0586 207-774-4000</p> <p><i>Attorney for Maine State Chamber of Commerce</i></p>	<p><u>/s/ Bruce C. Gerrity</u> Bruce C. Gerrity, Bar No. 2047</p> <p>PRETI, FLAHERTY, BELIVEAU, PACHIOS & HALEY LLP 45 Memorial Circle P.O. Box 1058 Augusta, ME 04332-1058 207-623-5300</p> <p><i>Attorney for Maine Automobile Dealers Association Insurance Trust</i></p>

STATE OF MAINE
DIRIGO HEALTH BOARD

Re: DETERMINATION OF AGGREGATE)
MEASURABLE COST SAVINGS FOR THE) DECISION-MOTION TO CONTINUE
SECOND ASSESSMENT YEAR (2007))

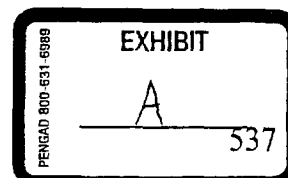
I. PROCEDURAL HISTORY

The Dirigo Health Act established the Dirigo Health Agency (DHA) as an independent executive agency to arrange for the provision of comprehensive, affordable health care coverage to eligible small employers including the self-employed, their employees and dependents, and individuals on a voluntary basis. The Act further declared Dirigo Health to be responsible for monitoring and improving the quality of health care in Maine. Lastly, the Legislature stated that the exercise by Dirigo Health of the powers conferred by this chapter must be deemed and held to be the performance of essential governmental functions. 24-A M.R.S.A. § 6902. Additionally, the Dirigo Health Act gives the Dirigo Health Agency "all powers necessary or convenient to effect the purpose for which Dirigo Health is organized or to further the activities in which Dirigo Health may lawfully be engaged, including the establishment of the Dirigo Health Program." 24-A M.R.S.A. § 6908(1)(C). In furtherance of the charges established by these sections, the Dirigo Health Agency Board of Directors (Board) scheduled a hearing in the above matter for March 27, 2006, to determine the aggregate measurable cost savings (AMCS) for the second assessment year.

The Dirigo Health Agency, by and through its counsel, filed a motion on March 7, 2006, requesting that the hearing in the above matter be continued from March 27, 2006 until a date after August 1, 2006. The motion also requested that the filing deadlines be suspended. The primary reason given by the DHA for its motion centered around its statement that "the relevant data necessary to calculate the AMCS for 2005, including Medicare cost reports, will not be available until July 1, 2006, which is the filing deadline for hospitals with fiscal years ending December 31...The unavailability of the data makes it impossible for DHA to prepare and present its case."

The hearing officer on March 7 notified the parties by e-mail that the above motion had been filed and, consequently, that he had cancelled the conference of counsel scheduled for March 9, 2006. The parties were afforded the opportunity to file memoranda either in support or opposition to the DHA's motion by 5:00 p.m. on March 13, 2006, and the parties also had the opportunity to present oral argument on March 14, 2006 before the hearing officer who was acting for the Board pursuant to 5 M.R.S.A. § 9062.

Anthem Health Plans of Maine, Inc., Maine Chamber of Commerce, Maine Automobile Dealers Association Insurance Trust, and the Maine Association of Health Plans appeared and presented oral argument to supplement their written ones in opposition to the Motion for Continuance. The Dirigo Health Agency and Consumers for Affordable Health Care appeared



and presented oral argument to supplement their written ones in support of the Motion for Continuance. At the March 14 hearing, the hearing officer explained on the record that the Board would not have a quorum until March 27, 2006¹ and therefore he would be responsible for preparing a report or proposed findings in writing for the Board's consideration and that a copy of such would be provided to each party with an opportunity for a response or exceptions to be filed by each party. 5 M.R.S.A. §9062.4.

A. Purpose of Determining the Aggregate Measurable Cost Savings

Preliminarily, the purpose of determining the aggregate measurable cost savings is to enable the Board to establish the savings offset payment amount to be assessed against insurers, third party administrators, and excess benefit insurance carriers. 24-A M.R.S.A. § 6913(2)(C and D). No assessment may be set or collected without a determination of savings. 24-A M.R.S.A. § 6913(2)(C). The assessment, in turn, funds the subsidies referred to in section 6912 of the Dirigo Health Act. 24-A M.R.S.A. § 6913(2)(D). The subsidies are of importance since they ostensibly enable DHA's enrollees to obtain affordable medical coverage. If the data collected is inaccurate and results in lower savings, a lower assessment will result with a concomitant lower subsidy and less money to support enrollees' costs. This would most likely result in fewer individuals being eligible for the DirigoChoice product. Similarly, if the data collected is inaccurate and results in higher savings, the affected hospitals and other parties may be paying more than their fair share of costs.

B. The Statute

The controlling statute in this matter is found at 24-A M.R.S.A. § 6913(1)(A) and reads as follows:

After an opportunity for hearing conducted pursuant to Title 5, chapter 375, subchapter 4, the board shall determine annually not later than April 1st the aggregate measurable savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in this State as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004.

II. THE PARTIES' ARGUMENTS

The opponents of the Motion to Continue basically argue that the plain language of the above statute is clear and that the DHA and Board, being created by the Maine Legislature, have only the authority granted to them by statute. The opponents assert that the word "shall" when read in context with the words "not later than" must be construed to be mandatory rather than directional thereby precluding the Board from granting the continuance past March 31, 2006. "If [the agency] exceeds those powers, or, though it has jurisdiction over the subject-matter,

¹ The Board consists of 7 members, 5 of whom are authorized to vote. Of the five, one member was in Poland, one in Florida, one incapacitated due to a medical condition, one was present but recused due to a conflict of interest, and one was present throughout these proceedings.

proceeds in a manner unauthorized by the statute, or otherwise exceeds its authority, its decrees are of no validity,....” *New England Tel*, 362 A.2d at 746, quoting *S.D. Warren, Co. v. Maine Central R.R. Company*, 126 Me. 23, 25, 135 A. 526, 528 (1926).

The opponents further argue that if the hearing was to be postponed until after August 1, 2006, the statutory timeframe could not be complied with which requires rates to be effective on January 1, 2007. For example, once the Board issues its determination of the aggregate measurable cost savings for the second assessment year, the Board has thirty days in which to file its determination with the Superintendent of Insurance, who will then have six weeks to conduct an independent adjudicatory hearing and render a decision. Subsequently, the matter shifts back to the Board which must issue the final savings offset payment assessment. 24-A M.R.S.A. § 6913(1)(B) and (C). The member companies then must compute the amount required to be included in the rates and have time to notify their customers. This argument, however, would not appear to require the denial of the instant motion especially if the hearing was continued until early July 2006 rather than after August 1, 2006.

The proponents assert that the Medicare Cost Reports are vital to calculate the key cost savings established by the Dirigo Health Act. They refer to language related to the DHA’s determination of the first assessment year’s calculation of the AMCS to the effect that “Data sources used must be readily available, verifiable and auditable, and to the extent possible, used for multiple purposes to ensure accuracy of the underlying data.” (Savings Offset Payment Final Report, Dirigo Health Agency, September 19, 2005, “Methodology and Assumptions, at p. 9). The Medicare Cost Reports provide data such as consolidated operating margins, total “hospital only expenses” including the inpatient and outpatient cost per case mix adjusted discharge, and the hospitals’ bad debts and charity care. Even though perhaps only 9 of Maine’s 39 hospitals may have a fiscal year that ends on December 31, thereby precluding the DHA from gaining access to their data until June 1 at the earliest, the lack of data from those institutions may well have a marked effect on the accuracy of the Board’s determination of the AMCS for the second assessment year.

The proponents further argue that the statutory provision for the filing of the Board’s determination of the aggregate measurable cost savings for the second assessment year “not later than April 1st” was intended to “ensure a prompt orderly process rather than a jurisdictional requirement.” They argue that the above timeframe for regulatory action is directory rather than mandatory and cite *Anderson v. Commissioner of the Department of Human Services*, 489 A. 2d 1094 (Me. 1985) in support of their assertions. In *Anderson*, the Law Court rejected an argument that the Department of Human Services was estopped from recouping an overpayment of AFDC payments because it failed to take action within the regulatory timeframe. The Court stated that “We recently adopted the view that statutory provisions requiring an act to be done within a certain time are directory and not mandatory or jurisdictional unless the statute manifests a clear intent to the contrary.” *Id.* at 1099.

In *Bradbury Memorial Nursing Home v. Tall Pines Manor Associates and Department of Human Services*, 485 A. 2d 634 (Me. 1984), the Law Court concluded that the statutory 150-day review period for applications for a certificate of need was directory and not mandatory. The

Court stated that it could “find no clearly expressed intent to make the time periods mandatory or jurisdictional. Those time periods of the Certificate of Need Act serve the hortatory purpose of curbing bureaucratic delay, and give an applicant a legal basis for going to the Superior Court to get an order requiring the Department to render a decision. However, they do not mean that it is absolutely essential that the specified action take place within the set time periods else the action can never thereafter be taken.” *Id.* At 641-642.

The Proponents further cite the Law Court decision in *Public Advocate v. Public Utilities Comm’n*, 1998 ME 218, para. 24; 718 A. 2d 201, 207-208 (Me. 1998) wherein the Court affirmed the Public Utilities Commission’s decision to defer the imposition of a surcharge related to the implementation and predicted effect of a commission rule to a time when the precise amount of the resulting costs would become known. The Court recognized that “[i]n addition to its powers expressly conferred by statute, the Commission has implied powers to the extent necessary to fulfill its obligations effectively.”

The Law Court decision in *Davric Maine Corp. v. Harness Rac. Com’n*, 732 A. 2d 289 (Me. 1999) involved a harness racing law which required the Maine Harness Racing Commission to conduct and certify elections on a biannual basis for the purpose of determining “the exclusive bargaining agent to represent licensed harness horse owners, trainers and drivers at each racetrack within that racing segment.” The statute, among other things, required that eligible voters cast their votes “no later than the following February 28th or by appearing and voting in person, by secret ballot, at the public polling conducted pursuant to subsection 3.” Due to an error in printing some of the ballots, the Commission created and mailed a second ballot with an extension of filing time to March 4, 1998 at 5:00 p.m. Additionally, all eligible voters were allowed to cast their votes in person on March 7.

The Law Court, in that decision, stated language appropriate to the instant decision. The Court concluded that the Commission did not violate the statute by counting all mailed ballots on March 4 despite the statute’s requirement that mailed ballots be received by February 28. The Court reasoned that:

The harness racing statute provides no mechanism for responding to logistical difficulties in the election process nor does it specify a remedy for deviations from the election schedule set forth in the statute. We have declined to ‘create a remedy or penalty when a statute is silent regarding the sanction for failure of an agency to timely act.’ *Bureau v. Staffing Network, Inc.*, 678 A. 2d 583,590 (Me. 1996).

The Court further explained that it was not the Court’s responsibility to “create a sanction where none is expressed or implied” and quoted with approval the *Anderson* language that “statutory provisions requiring an act to be done within a certain time are directory and not mandatory or jurisdictional unless the statute manifests a clear intent to the contrary.” 489 A. 2d at 1099.

III.

PROPOSED BOARD DECISION

The Board concludes that granting the Motion for Continuance will not result in any undue prejudice to any party but will result in a more accurate determination of aggregate measurable cost savings for 2005 in order that a fair and equitable assessment can be calculated for 2007. We do not agree that the Legislature intended to force the DHA and Board to proceed to a hearing by April 1 which would, in all likelihood, result in a decision based on incomplete, outdated data. Additionally, even if the Board denied the current motion and held a hearing by April 1, 2006, a second hearing in July or August would most probably be necessary in order to receive and analyze additional evidence which is unavailable until June 2006 at the earliest. Holding two hearings rather than one is neither cost effective nor an efficient use of the Board's time. The Board further concludes that the subject statutory language stating that "the board shall determine annually not later than April 1st the aggregate measurable savings" is directory and not mandatory or jurisdictional since the statute does not manifest a clear intent to the contrary and neither does it specify a remedy for deviations from the schedule set forth in that statute.

Wherefore, the Motion for Continuance is Granted by a vote of until the matter is next scheduled for an adjudicatory hearing not later than August 15, 2006.

Dated: March 27, 2007

Robert A. McAfee, M.D. Chairman
Board of Directors, Dirigo Health Agency

IV.

RIGHTS OF APPEAL

To the extent that an appeal is authorized, pursuant to the provisions of 5 M.R.S.A. § 11001 and 11002, any party that decides to appeal this Decision and Order must file a petition for Review within 30 days of the date of receipt of this Order with the Superior Court having jurisdiction. The petition shall specify the person seeking review, the manner in which they are aggrieved and the final agency action which they wish reviewed. It shall also contain a concise statement as to the nature of the action or inaction to be reviewed, the grounds upon which relief is sought and a demand for relief. Copies of the Petition for Review shall be served by Certified Mail Return Receipt Requested upon the State of Maine Dirigo Health Agency, all parties to the agency proceedings, and the Maine Attorney General.

STATE OF MAINE
DIRIGO HEALTH AGENCY

RE: DETERMINATION OF)	NOTICE OF PENDING
AGGREGATE MEASURABLE)	PROCEEDING AND
COST SAVING FOR THE SECOND)	HEARING
ASSESSMENT YEAR (2007))	

The Board of Directors of the Dirigo Health Agency issues this Notice of Pending Proceeding and Hearing in the above-captioned matter.

1. Pending Proceeding and Public Hearing

Pursuant to 24-A M. R. S. A. § 6913 (1) (A), and the Maine Administrative Procedure Act, 5 M. R. S. A. §9051, et seq., the Board of Directors of the Dirigo Health Agency hereby gives public notice of a pending adjudicatory proceeding on the determination of aggregate measurable cost savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in the State as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004.

Pursuant to 5 M. R. S. A. §9052, the Board hereby gives notice that an adjudicatory hearing will be held on the determination of aggregate measurable cost savings beginning at 9:00 a. m. on March 15, 2006, in the Hearing Room at the Maine Public Utilities Commission, 242 State Street, Augusta, Maine. The hearing will continue on March 16 and 17 if deemed necessary by the Board. Members of the public are invited to attend the hearing.

2. The purpose of the hearing is for the Board to adopt a methodology for the determination of aggregate measurable cost savings, and, using that methodology, determine the amount of aggregate measurable cost savings for the second assessment year. The Board must make its determination no later than April 1, 2006.

3. Intervention

The Dirigo Health Agency is a party to the proceeding. Other persons wishing to intervene as parties to the proceeding shall file their applications in writing with the Board by 3:00 p. m., February 10, 2006. Only persons willing to undertake the responsibilities placed upon parties to an adjudicatory proceeding under this notice and any procedural orders issued by the Board should seek intervenor status. These responsibilities include, but are not limited to, the presentation of a methodology to be considered by the Board; the presentation of the components to be included in aggregate measurable cost savings; the presentation of credible, reliable and accurate data to support the amount of aggregate measurable cost savings derived from that methodology;

PEWGA00 000-631-6088

EXHIBIT

B 542

and, the submission of pre-filed testimony, all within the time frames established by the Board.

Applications for intervention should be either hand delivered the Board at the offices of the Dirigo Health Agency, 211 Water Street, Augusta, Maine, or mailed to the Board at the following Address:

Board of Directors, Dirigo Health Agency
Attn: Lynn Theberge
Dirigo Health Agency
53 State House Station
Augusta, Maine 04333-0053

An applicant claiming intervention as of right pursuant to 5 M. R. S. A. §9054 (1) shall include in the application a statement either explaining how the applicant is or may be, or is a member of a class that is or may be, substantially and directly affected by the proceeding or identifying the applicant as an agency of federal, state or local government. Applicants for permissive intervention pursuant to 5 M. R. S. A. §9054 (2) shall contain a statement explaining and substantiating the applicant's interest in the proceeding. The Board will not grant late applications without a showing of good cause.

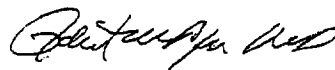
If the Dirigo Health Agency or any other party opposes an application for intervention, it shall file a statement in opposition to the application with the Superintendent by 12:00 noon February 15, 2006.

4. Hearing Procedure

The Board will conduct the proceeding in accordance with the provisions of the Maine Administrative Procedure Act, 5 M. R. S. A. §9051, et. seq. All parties to the proceeding have the right to present evidence and arguments on the issues and to call and examine witnesses and to cross exam any persons present and testifying. The Board will issue a separate order to establish certain procedural requirements and deadlines for the proceeding.

Dated: January 27, 2006

BOARD OF DIRECTORS
DIRIGO HEALTH AGENCY



Robert McAfee, M.D.
Chair, Dirigo Board of Directors

STATE OF MAINE

DIRIGO HEALTH AGENCY

RE: DETERMINATION OF
AGGREGATE MEASURABLE
COST SAVING FOR THE SECOND
ASSESSMENT YEAR (2007)

PROCEDURAL ORDER
NO. 1

The Board of Directors of the Dirigo Health Agency issues this Procedural Order No. 1 in the above captioned matter.

On January 27, 2006, the Board of Directors of the Dirigo Health Agency issued a Notice of Pending Proceeding and Hearing in this matter. 24-A M. R. S. A. § 6913 (1) (A) requires that the Board hold an adjudicatory hearing on the determination of aggregate measurable cost savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in the State as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2006.

In the January 27, 2006 Notice, the Board provided notice that the hearing would be at 9:00 a. m. on March 16, 2006, in the Hearing Room of the Maine Public Utilities Commission, 242 State Street, Augusta, Maine. Subsequent days of hearings, to the extent deemed necessary by the Board, will be held on March 16, and 17, 2006.

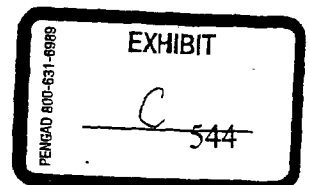
The hearing will be conducted pursuant to and in accordance with the Maine Administrative Procedure Act, M. R. S. A. § 9051, et. seq. and this Procedural Order No. 1.

1. Parties and Intervention

The Dirigo Health Agency is a party to the proceeding. The January 27, 2006 Notice advised that other persons wishing to intervene as parties to the proceeding shall file their applications in writing with the Board no later 3:00 p.m. on February 10, 2006.

Only persons willing to undertake the responsibilities placed upon parties to an adjudicatory proceeding as set forth in the January 27, 2006 Notice and this Procedural Order No. 1 should seek intervenor status. Persons granted intervenor status become full or limited parties to the proceeding who may present evidence and arguments on the issues; pre-file testimony and exhibits; be subject to cross-examination; and file motions, briefs and other pleadings.

2. Schedule of Proceeding



The schedule of proceeding set forth below is hereby established by the Board. All persons are advised that this schedule is subject to change based upon developments in the proceeding and should verify the current schedule as necessary.

Intervention	3:00 p.m. February 10, 2006.
Statements in Opposition To Intervention	12:00 noon February 15, 2006.
Exchange of Witness List And Documents	3:00 p.m. March 3, 2006.
Designation of Expert Witnesses with Rule 26 Disclosure	3:00 p.m. March 3, 2006.
Identification of Methodology and Supporting Data	3:00 p.m. March 8, 2006.
Pre-filed Testimony And Exhibits	12:00 noon March 10, 2006.
Pre-Hearing Briefs	12:00 noon March 14, 2006.
First Session of Public Hearing	9:00 a.m. March 15, 2006.

3. Exchange of Witness List and Documents

A party shall provide to other parties and file with the Board in accordance with the Schedule of Proceedings the following information:

- a. The name, address and telephone number of each witness the party intends to, or may, present at the hearing;
- b. A summary of the testimony to be presented by each witness;
- c. A copy of each document or other exhibit, including summaries of other evidence, the party intends to, or may, present at the hearing;
- d. The name, address and telephone number of each person the party expects to call as an expert witness and the information required to be disclosed under Rule 26 (b) (4) (A), M. R. Civ. P.; and,

e. A detailed description of the methodology for determining aggregate measurable cost, including the components to be included in aggregate measurable cost savings, the party intends to present; and credible, reliable and accurate data that supports the amount of aggregate measurable cost savings derived from the methodology.

4. Service of Documents

a. Where to File.

All filings and other correspondence relating to this proceeding should be either hand delivered to the Board at the offices of the Dirigo Health Agency, 211 Water Street, Augusta, Maine, or mailed to the Board at the following address:

Board of Directors, Dirigo Health Agency
Attn: Lynn Theberge
Dirigo Health Agency
53 State House Station
Augusta, Maine 04333-0053

b. Method of Filing

- (1) Two (2) hard copies must be filed with the Board.
- (2) One (1) hard copy must be filed with the Hearing Officer

- (3) One (1) hard copy must be filed with the Dirigo Health Agency

counsel

- (4) One (1) hard copy must be served on all parties to the proceeding

- (5) One (1) identical electronic copy of the document must be filed with the Board via e-mail sent to the following address:

Lynn.C.Theberge@maine.gov

c. Service List

The Board will establish a service list and provide the list to all parties. Each party shall provide the Board within forty-eight (48) hours of being granted party status the name, address, telephone number, FAX number and e-mail address of one person to accept service for that party is to be made.

5. Motions

Every request or motion for an order or ruling by the Board shall be in writing, unless made on the record during the hearing to which the request or motion is related. Every request or motion shall state with particularity the grounds therefore and shall set forth the order or ruling sought. A party shall file with the request or motion or incorporate within the request or motion (i) a memorandum with citations to supporting authorities and (ii) a draft order which grants the motion and specifically states the relief to be granted.

Any party opposing a request or motion shall file within four (4) calendar days after receipt of the motion a memorandum in opposition to the request or motion.

Memorandum in support of or in opposition to a request or motion shall not exceed five (5) pages.

6. Pre-filed Testimony and Exhibits

On the deadline established for pre-filing, any party wishing to present evidence shall pre-file with the Board written testimony and exhibits of each witness the party intends to present in support of its direct case. A copy of all testimony and exhibits must be served on all other parties to the proceeding in accordance with the requirements set forth above. Such testimony will be admitted at the hearing only if the witness, under oath, affirms the pre-filed testimony and is subject to cross-examination. The pre-filed testimony shall be in question and answer format; summary or other non-testimonial material shall not be accepted.

Pre-filed testimony and exhibits are subject to objection when offered at the hearing, but in relevant will be admitted unless the witness submitting the testimony is available at the hearing for cross-examination.

Pre-filed testimony and exhibits shall be limited to the issues and subject matter outlined in the applicable statutes and by any applicable order of the Board.

7. Consolidation of Presentations

The Board will require parties with similar interests to consolidate presentations of evidence and argument at the hearing. Accordingly, parties with similar interests shall, among other matters, coordinate the use of experts and the testimony of witnesses and issues to be addressed at the hearing.

Dated: February __, 2006

**BOARD OF DIRECTORS
DIRIGO HEALTH AGENCY**

Robert McAfee, M.D., Chair

STATE OF MAINE

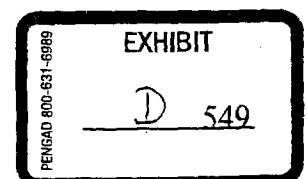
DIRIGO HEALTH AGENCY

RE: DETERMINATION OF)	ORDER ON
AGGREGATE MEASURABLE)	INTERVENTION
COST SAVING FOR THE SECOND)	AND RESPONSE TO
ASSESSMENT YEAR (2007))	OBJECTIONS TO
)	PROCEDURAL ORDER
)	NO. 1

Anthem Health Plans of Maine, Inc. d/b/a Anthem Blue Cross and Blue Shield ("Anthem BCBS"), the Maine Association of Health Plans ("MAPH"), the Maine State Chamber of Commerce ("Chamber") and the Maine Automobile Dealers Association Insurance Trust (the "Trust") have filed timely applications to intervene in this proceeding. Each of these applicants included with their applications objections to a draft of Procedural Order No. 1.

Order on Intervention

Anthem BCBS is the State's largest health insurance carrier and the current administrator of the DirigoChoice Health Plan. As an insurance carrier, it has a responsibility under the Dirigo Act to use its best efforts to ensure that it has recovered savings offset payments through negotiated reimbursement rates. 24-A M. R. S. A. § 6913 (7). Sharon Roberts, Director of Stakeholder Relations for Anthem BCBS, participated in the Working Group established pursuant to P. L. 2005, ch. 400 and was as a party to proceedings before the Superintendent of Insurance pursuant Chapter 400 regarding the Dirigo Board's determination of aggregate measurable cost savings for the first assessment year. The Board has not received a timely objection to Anthem BCBS's



application to intervene. The application to intervene as a party is granted pursuant to 5 M. R. S. A. § 9054 (1).

The **MAHP** is a business association that advocates for its members. Its members include health insurers, health maintenance organizations and third party administrators. Anthem BCBS is a member of MAHP. The health insurer members of MAHP have a responsibility under the Dirigo Act to use their best efforts to ensure that they have recovered savings offset payments through negotiated reimbursement rates. 24-A M. R. S. A. § 6913 (7). Some members of MAHP may be required to make savings offset payments based on the determination of aggregate measurable cost savings. Katherine Pelletreau, Executive Director of MAHP, regularly attended meetings of the Working Group established by Chapter 400. Joe Mackey of MAHP also attended some meetings. MAHP participated as a party in proceedings before the Superintendent of Insurance pursuant Chapter 400 regarding the Dirigo Board's determination of aggregate measurable cost savings for the first assessment year. The Board has not received a timely objection to MAHP's application to intervene. The application to intervene as a party is granted pursuant to 5 M. R. S. A. § 9054 (1).

The **Chamber** is a statewide business association. Its members include businesses that provide group health coverage for their employees through self-funded plans and through insured plans. To the extent insurance carriers are permitted to pass on to employers the savings offset payments made to Dirigo Health, the businesses represented by the Chamber may be impacted by the determination of aggregate measurable cost savings. Kristine Ossenfort, Senior Governmental Affairs Specialist for the Chamber, was an alternate member of the Working Group established by Chapter

400. The Chamber actively contributed to the Board's consideration of aggregate measurable cost savings for the first assessment year and retained an expert to evaluate a methodology proposed by the Dirigo Health Agency. Chamber participated as a party in proceedings before the Superintendent of Insurance pursuant Chapter 400 regarding the Dirigo Board's determination of aggregate measurable cost savings for the first assessment year. The Board has not received a timely objection to Chamber's application to intervene. The application to intervene as a party is granted pursuant to 5 M. R. S. A. § 9054 (1).

The Trust is a multiple employer welfare arrangement ("MEWA") that secures health insurance for approximately 3,200 employee participants, and approximately 5,800 insurable lives. The Trust employs a third-party administrator ("TPA") to manage and administer its health insurance programs. To the extent its TPA is permitted to pass on to the Trust the savings offset payments made to Dirigo Health, the Trust and the businesses represented by the Trust may be impacted by the determination of aggregate measurable cost savings. Bruce Gerrity, counsel for the Trust, regularly attended meetings of the Working Group established by Chapter 400. The Trust participated as a party in proceedings before the Superintendent of Insurance pursuant Chapter 400 regarding the Dirigo Board's determination of aggregate measurable cost savings for the first assessment year. The Board has not received a timely objection to the Trust's application to intervene. The application to intervene as a party is granted pursuant to 5 M. R. S. A. § 9054 (1).

Objections to Procedural Order

MAHP, Chamber, Anthem BCBS and the Trust ("Applicant Intervenors") application have objected to a draft of Procedural Order No. 1 ("Draft Order") on numerous grounds. They object to a requirement that parties submit a proposed methodology to determine aggregate measurable cost savings with supporting data. The Legislature has directed the Board to determine "annually not later than April 1st the aggregate measurable savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in this State as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in MaineCare eligibility occurring after June 30, 2004." 24-A M. R. S. A. §6913 (1)(A). In order to fulfill this responsibility, the Board would benefit from the presentation of alternative methodologies for determining aggregate measurable cost savings. The Board is aware, however, that imposing on a party a requirement that the party submit an alternative methodology may limit the number parties that could meaningfully participate in the proceeding. Accordingly, the Board has made the presentation of an alternative methodology optional. A party that intends to submit an alternative methodology will be required to submit the methodology in accordance with any procedural order that the Board may issue.

The application object that the Draft Oder does not provide for discovery. This is an administrative proceeding governed by the Maine Administrative Procedures Act. ("APA") The Act does not require that there be an opportunity for discovery. To the extent the Dirigo Health Agency has information that is not publicly available from other

sources that application believe is necessary to prepare their case, application can request the information under the Maine Freedom of Access Act. Related to this objection is the objection of application to the schedule for established for the proceeding. The schedule is driven by the short time frame the Legislature has established for the Board to make a determination of aggregate measurable cost savings; informed by the fact that the proceeding comes on the heels of an adjudicatory hearing before Superintendent of Insurance in October 2005; and the familiarity of all interested persons with the issues presented.

With regard to the charge of the application that parties have not be given enough time to prepare a case, the Board notes that the Dirigo Act as originally enacted in 2003 included the requirement that the Board, after an adjudicatory hearing, make a determination of aggregate measurable cost savings not later than April. This provision was carried over into Chapter 400. Application were members of, or attended the meetings of, the Working Group and were parties to proceedings before the Superintendent in October 2005. Application, therefore, have had more than sufficient notice that the Board would be holding an adjudicatory hearing prior to April of 2006. Furthermore, the Board requested that the application join in an effort the amend the Dirigo Act to change the date for a determination of aggregate measurable cost savings in order to allow all parties sufficient time to collect and evaluate data and to prepare for a proceeding on aggregate measurable cost savings for the second assessment year. The application refused to support such an effort. Under these circumstances, the application cannot be heard to object to the schedule set by the Board.

Dated: February 17, 2006

BOARD OF DIRECTORS
DIRIGO HEALTH AGENCY

A handwritten signature in black ink, appearing to read "Robert McAfee", written in a cursive style.

Robert McAfee, M. D. Chair

STATE OF MAINE

DIRIGO HEALTH AGENCY

RE: DETERMINATION OF) PROCEDURAL ORDER
AGGREGATE MEASURABLE) NO. 3
COST SAVING FOR THE SECOND)
ASSESSMENT YEAR (2007))

The Board of Directors of the Dirigo Health Agency issues this Procedural Order No. 3 in the above captioned matter.

On January 27, 2006, the Board of Directors of the Dirigo Health Agency issued a Notice of Pending Proceeding and Hearing in this matter. 24-A M. R. S. A. § 6913 (1) (A) requires that the Board hold an adjudicatory hearing on the determination of aggregate measurable cost savings, including any reduction or avoidance of bad debt and charity care costs to health care providers in the State as a result of the operation of Dirigo Health and any increased MaineCare enrollment due to an expansion in Maine Care eligibility occurring after June 30, 2004.

On February 22, 2006, the Board issued an Amended Notice of Pending Proceeding and Hearing advising that the hearing would begin at 9:00 a. m. on March 27, 2006, at a location to be determined. Subsequent days of hearings, to the extent deemed necessary by the Board, will be held on March 28, and 29, 2006.

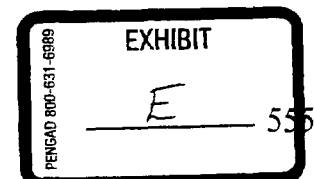
The hearing will be conducted pursuant to and in accordance with the Maine Administrative Procedure Act, 5 M. R. S. A. § 9051, et. seq. and this Procedural Order No. 1.

1. Parties and Intervention

The Dirigo Health Agency is a party to the proceeding. The January 27, 2006 Notice advised that other persons wishing to intervene as parties to the proceeding shall file their applications in writing with the Board no later 3:00 p.m. on February 10, 2006.

Only persons willing to undertake the responsibilities placed upon parties to an adjudicatory proceeding as set forth in the January 27, 2006 Notice and Procedural Order No. 1 should seek intervenor status. Persons granted intervenor status may present evidence and arguments on the issues; pre-file testimony and exhibits; be subject to cross-examination; and file motions, briefs and other pleadings.

2. Schedule of Proceeding



The amended schedule of proceeding set forth below is hereby established by the Board. All persons are advised that this schedule is subject to change based upon developments in the proceeding and should verify the current schedule as necessary.

Intervention	3:00 p.m. February 10, 2006.
Statements in Opposition To Intervention	12:00 noon February 15, 2006.
Exchange of Witness List And Documents	5:00 p.m. March 10, 2006.
Designation of Expert Witnesses with Rule 26 Disclosure	5:00 p.m. March 10, 2006.
Identification of Methodology and Supporting Data	5:00 p.m. March 13, 2006
Pre-filed Testimony And Exhibits	5:00 p.m. March 20, 2006
Pre-Hearing Briefs	5:00 p.m. March 24, 2006.
First Session of Public Hearing	9:00 a.m. March 27, 2006.

3. Exchange of Witness List and Documents

A party shall provide to other parties and file with the Board in accordance with the Schedule of Proceeding the following information:

- a. The name, address and telephone number of each witness the party intends to, or may, present at the hearing;
- b. A summary of the testimony to be presented by each witness;
- c. A copy of each document or other exhibit, including summaries of other evidence, the party intends to, or may, present at the hearing;
- d. The name, address and telephone number of each person the party expects to call as an expert witness and the information required to be disclosed under Rule 26 (b) (4) (A), M. R. Civ. P.; and,

e. Parties intending to propose a methodology to determine aggregate measurable cost savings shall provide a detailed description of the methodology for determining aggregate measurable cost, including the components to be included in aggregate measurable cost savings, the party intends to present; and credible, reliable and accurate data that supports the amount of aggregate measurable cost savings derived from the methodology.

4. Service of Documents

a. Where to File.

All filings and other correspondence relating to this proceeding should be either hand delivered to the Board at the offices of the Dirigo Health Agency, 211 Water Street, Augusta, Maine, or mailed to the Board at the following address:

Board of Directors, Dirigo Health Agency
Attn: Lynn Theberge
Dirigo Health Agency
53 State House Station
Augusta, Maine 04333-0053

b. Method of Filing

(1) Two (2) hard copies must be filed with the Board.

(2) One (1) hard copy must be served on all parties to the proceeding and on the hearing officer.

(3) One (1) hard copy must be served on counsel for Dirigo Health Agency:

Kelly Turner, AAG
Department of Attorney
6 State House Station
Augusta, Maine 04333-0006

(4) One (1) hard copy must be served on counsel for the Board:

William H. Laubenstein, III, AAG
Department of Attorney
6 State House Station
Augusta, Maine 04333-0006

(5) One (1) identical electronic copy of the document must be filed with the Board via e-mail sent to the following address:

c. Service List

The Board will establish a service list and provide the list to all parties. Each party shall provide the Board within forty-eight (48) hours of being granted party status the name, address, telephone number, FAX number and e-mail address of one person to accept service for that party is to be made.

5. Motions

Every request or motion for an order or ruling by the Board shall be in writing, unless made on the record during the hearing to which the request or motion is related. Every request or motion shall state with particularity the grounds therefore and shall set forth the order or ruling sought. A party shall file with the request or motion or incorporate within the request or motion (i) a memorandum with citations to supporting authorities and (ii) a draft order which grants the motion and specifically states the relief to be granted.

Any party opposing a request or motion shall file within four (4) calendar days after receipt of the motion a memorandum in opposition to the request or motion.

Memorandum in support of or in opposition to a request or motion shall not exceed five (5) pages.

6. Pre-filed Testimony and Exhibits

On the deadline established for pre-filing, any party wishing to present evidence shall pre-file with the Board written testimony and exhibits of each witness the party intends to present in support of its direct case. A copy of all testimony and exhibits must be served on all other parties to the proceeding in accordance with the requirements set forth above. Such testimony will be admitted at the hearing only if the witness, under oath, affirms the pre-filed testimony and is subject to cross-examination. The pre-filed testimony shall be in question and answer format; summary or other non-testimonial material shall not be accepted.

Pre-filed testimony and exhibits are subject to objection when offered at the hearing, but in no event will be admitted unless the witness submitting the testimony is available at the hearing for cross-examination.

Pre-filed testimony and exhibits shall be limited to the issues and subject matter outlined in the applicable statutes and by any applicable order of the Board.

7. Consolidation of Presentations

The Board will require parties with similar interests to consolidate presentations of evidence and argument at the hearing. Accordingly, parties with similar interests shall, among other matters, coordinate the use of experts and the testimony of witnesses and issues to be addressed at the hearing.

Dated: February 22, 2006

BOARD OF DIRECTORS
DIRIGO HEALTH AGENCY

A handwritten signature in cursive script, appearing to read "Robert McAfee", written in dark ink.

Robert McAfee, M.D., Chair

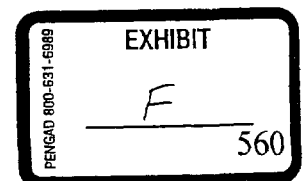
STATE OF MAINE

DIRIGO HEALTH AGENCY

RE: DETERMINATION OF)
AGGREGATE MEASURABLE) DIRIGO HEALTH AGENCY'S
COST SAVING FOR THE SECOND) MOTION TO CONTINUE
ASSESSMENT YEAR (2007)) HEARING AND TO SUSPEND
) FILING DEADLINES
)

NOW COMES Dirigo Health Agency ("DHA"), by and through its counsel, Kelly L. Turner, Assistant Attorney General, and moves the Board of Directors of Dirigo Health (the "Board") to continue the public hearing on aggregate measurable cost savings ("AMCS") for year two scheduled for March 27, 2006, and to suspend the filing deadlines contained in Procedural Order No. 3, and as grounds states as follows:

1. A public hearing to determine AMCS is scheduled for March 27, 2006, at 9:00 a.m.
2. Title 24-A M.R.S.A. § 6913 directs the Board to determine AMCS annually by April 1. However, the relevant data necessary to calculate AMCS for 2005, including, Medicare cost reports, will not be available until July 1, 2006, which is the filing deadline for hospitals with fiscal years ending December 31. This data is crucial in enabling DHA to present accurate, updated information to the Board so that it may make a fair determination of AMCS. The unavailability of the data makes it impossible for DHA to prepare and present its case.
3. Conducting the hearing as scheduled on March 27 would be futile, unfair, costly, and would not benefit the parties to this proceeding.



4. Rescheduling the hearing to a date following the release of the Medicare cost reports and allowing sufficient time to analyze those reports, would not prejudice the parties and would not compromise or defeat the purpose of the proceeding.

5. The Board previously requested that the intervenors join in an effort to amend the Dirigo Act to change the date for a determination of AMCS in order to allow all parties sufficient time to collect and evaluate data and to prepare for a proceeding on AMCS for the second assessment year. After several meetings, the intervenors refused to support such an effort for the second assessment year.

6. DHA moves the Board to reschedule the hearing to a date after August 1, 2006, and to suspend the filing deadlines contained in Procedural Order No. 3 pending consideration of this motion.

WHEREFORE, DHA respectfully requests that the Board suspend the filing deadlines contained in Procedural Order No. 3, cancel the hearing scheduled for March 27 and reschedule it to a date after August 1, 2006.

Dated: March 7, 2006

/s/ Kelly L. Turner
Kelly L. Turner, Bar No. 9393
Assistant Attorney General
6 State House Station
Augusta, ME 04333-0006
(207) 626-8800

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-

MAINE ASSOCIATION OF HEALTH
PLANS, a corporation organized and existing
under the laws of the State of Maine,

ANTHEM HEALTH PLANS OF MAINE,
INC. d/b/a ANTHEM BLUE CROSS AND
BLUE SHIELD, a corporation organized and
existing under the laws of the State of Maine,

MAINE STATE CHAMBER OF
COMMERCE, a non-profit corporation
organized and existing under the laws of the
State of Maine,

and

MAINE AUTOMOBILE DEALERS
ASSOCIATION INSURANCE TRUST, a
multiple employer welfare arrangement
organized and existing under the laws of the
State of Maine,

Petitioners

v.

DIRIGO HEALTH AGENCY BOARD OF
DIRECTORS,

Respondent.

MOTION FOR EXPEDITED REVIEW
AND INCORPORATED
MEMORANDUM OF LAW

NOW COME Petitioners Maine Association of Health Plans ("MEAHP"), Anthem Health Plans of Maine, Inc. d/b/a Anthem Blue Cross and Blue Shield ("Anthem BCBS"), Maine State Chamber of Commerce (the "Chamber") and Maine Automobile Dealers Association Insurance Trust ("Trust") (collectively "Petitioners"), by and through their undersigned attorneys, and hereby move for expedited briefing and consideration of their Petition for Review

of Refusal of Agency to Act (the "Petition"). Unless the Court's consideration is expedited, Petitioners will be denied meaningful review of the Petition. In further support, Petitioners state as follows:

1. Petitioners have requested an order from this Court requiring the Dirigo Health Agency Board of Directors (the "Board") to immediately hold a hearing, as required by the Dirigo Health Act (the "Act"), to determine aggregate measurable cost savings as a result of the operation of Dirigo Health.

2. The Act requires that "[a]fter an opportunity for a hearing conducted pursuant to Title 5, chapter 375, subchapter 4, the board shall determine annually **not later than April 1st** the aggregate measurable cost savings...." 24-A M.R.S.A. § 6913(1)(A) (emphasis added).

3. By a vote of the Board taken on March 27, 2006, in derogation of this statutory requirement, the Board granted a motion by its Agency, the Dirigo Health Agency, to continue the current proceeding to determine aggregate measurable cost savings, and hold a hearing "not later than August 15, 2006." It is unclear from the Board's Order how long after August 15, 2006 the Board would propose to issue the decision that Section 6913(1)(A) required be issued on or before April 1, 2006.

4. For reasons stated in the Petition, following the timetable contemplated by the Board's Order will significantly prejudice the Petitioners. Unless the Court's review is expedited, the Board's Order delaying the determination required by 24-A M.R.S.A. § 6913 will effectively be affirmed without review.

5. The Parties previously briefed the issues relevant to the Petition in the underlying agency proceeding, and pursuant to Petitioners proposed schedule, Petitioners will file their Brief no later than tomorrow, March 31, 2006. Given that the issues have been briefed and the

analysis has already been performed by the Board prior to entry of the Board's Order, the Board should be able to file its opposition promptly.

6. Because justice requires the Petition to be reviewed expeditiously, and because the Board will not be prejudiced by such expedition, Petitioners request that the Court establish the following schedule:

Filing of Petitioners' Brief	Friday, March 31, 2006
Filing of Respondent's Brief	Tuesday, April 4, 2006
Hearing on Petition for Review of Failure or Refusal of Agency to Act	Friday, April 7, 2006


7. To aid in the expeditious review of the Petition, Petitioners submit herewith a record of the proceedings under review. If the Board believes that the record filed by Petitioners is incomplete, the Board may propose additions to the record.

Discussion

Petitioners Motion to Expedite the Rule 80C review process should be granted both because the Dirigo Health Act requirement is clear and because Petitioners will suffer significant prejudice if the Board's Order, and the schedule contemplated thereby, is maintained. This Court has given expedited treatment to cases of this nature in the past. *See e.g., Cent. Maine Med. Ctr. v. Concannon*, 2000 WL 33671789 (Me. Super. Ct., Ken. Cty., Sept. 26, 2000) (Studstrup, J.) (expediting case so that the decision was issued six days following the filing of the petition for review). As reflected above, unless the Court grants review on an expedited, Petitioners will be denied a meaningful review of the Petition.

For all of these reasons, Petitioners respectfully request that the Court grant this Motion to Expedite and review the Petition consistent with the schedule set forth herein.

DATED: March 30, 2006

<p><u>/s/ D. Michael Frink</u> D. Michael Frink, Bar No. 2637</p> <p>CURTIS THAXTER STEVENS BRODER & MICOLEAU LLC One Canal Plaza P.O. Box 7320 Portland, ME 04112-7320 207-774-9000</p> <p><i>Attorney for Maine Association of Health Plans</i></p>	<p> Christopher T. Roach, Bar No. 8122</p> <p>PIERCE ATWOOD LLP One Monument Square Portland, ME 04101 207-791-1100</p> <p><i>Attorney for Anthem Health Plans of Maine, Inc. d/b/a Anthem Blue Cross and Blue Shield</i></p>
<p><u>/s/ William H. Stiles</u> William H. Stiles, Bar No. 8123</p> <p>VERRILL DANA LLP One Portland Square P.O. Box 586 Portland, ME 04112-0586 207-774-4000</p> <p><i>Attorney for Maine State Chamber of Commerce</i></p>	<p><u>/s/ Bruce C. Gerrity</u> Bruce C. Gerrity, Bar No. 2047</p> <p>PRETI, FLAHERTY, BELIVEAU, PACHIOS & HALEY LLP 45 Memorial Circle P.O. Box 1058 Augusta, ME 04332-1058 207-623-5300</p> <p><i>Attorney for Maine Automobile Dealers Association Insurance Trust</i></p>